

California Regional Water Quality Control Board
North Coast Region

Complaint No. 98-61

Administrative Civil Liability Complaint
in the Matter of

U.S. Department of the Army,
Corps of Engineers
Kelly Road

Sonoma County

The Executive Officer of the California Regional Water Quality Control Board, North Coast Region (hereinafter Regional Water Board), hereby finds:

1. This complaint is issued to the U.S. Army Corps of Engineers (hereinafter Corps) based on violation of Time Schedule Order No. 97-130 and on provisions of the California Water Code 13308, which authorizes the imposition of Administrative Civil Liability for violations of a time schedule order.
2. Kelly Road was constructed in the mid-1950s as a private road to provide access to private lands and a route for hauling logged timber to Sonoma County lumber mills. During construction of Warm Springs Dam, the Corps took ownership of the road when Masonite Corporation conveyed its fee interest in Kelly Road to the United States. The conveyance did not affect the outstanding rights of several timberland owners to use the road.
3. Kelly Road traverses portions of the watersheds of the Gualala and Russian Rivers. The Corps has inadequately maintained the road, which was built with insufficient drainage structures. As a result, sediment is produced from the road and deposited into tributaries of the Gualala River, including the Wheatfield Fork Gualala River and the North Fork of Buckeye Creek; and to tributaries of the Russian River, including Rancheria Creek.
4. On May 15, 1997 the Regional Water Board issued Cleanup and Abatement Order No. 97-51. This Order required the US Army Corps of Engineers to cleanup and abate the discharge of earthen material from the Kelly Road. The following section of Cleanup and Abatement Order No. 97-51 was violated:
 2. On or before August 15, 1997, submit to the Regional Water Board a road sediment source inventory, including the locations and sediment volumes of ongoing and future erosion, for the length of Kelly Road owned by the Corps. Concurrently, submit a repair and maintenance plan, including locations of existing culverts, and locations where new culverts are needed for both ditch relief and stream crossings. These plans shall be prepared by a Professional Engineer, Certified Engineering Geologist, or other professional experienced in erosion control and road design. It shall delineate all intended compliance measures to control immediate as well as long term erosion of soil from the road and ensure compliance with the Basin Plan.
5. The Corps failed to submit a road sediment source inventory and a repair and maintenance plan by August 15, 1997 as required by Cleanup and Abatement Order No. 97-51.

6. On September 29, 1997, the Corps sent a letter to Regional Water Board staff stating that there was no requirement to abide by Cleanup and Abatement Order No. 97-51. The Corps would proceed with disposal of Kelly Road without making any repairs. The Corps relied upon a federal district court's decision in an eminent domain action and a Road Use Agreement between a previous owner of Kelly Road and a local landowner. Neither the court's decision nor the Road Use Agreement absolves the Corps, as the current owner of Kelly Road, from the responsibility to comply with Cleanup and Abatement Order No. 97-51 and abate discharges from Kelly Road.
7. In response, the Regional Water Board issued Time Schedule Order No. 97-130 on December 11, 1997. The following sections of the Order were violated:
 - A. On or before December 30, 1997, submit to the Regional Water Board a road sediment source inventory, including the locations and sediment volumes of ongoing and future erosion, for the length of Kelly Road owned by the Corps. Concurrently, submit a repair and maintenance plan, including locations of existing culverts, and locations where new culverts are needed for both ditch relief and stream crossings. The plan shall be prepared by a Professional Engineer, Certified Engineering Geologist, or other professional experienced in erosion control and road design. It shall delineate all intended compliance measures to control immediate as well as long term erosion of soil from the road and ensure compliance with the Basin Plan. The repair and maintenance plan shall include a schedule for completing measures to control long term erosion.
 - B. The interim cleanup and abatement activities to control immediate erosion problems specified in the plan shall be completed by January 30, 1998. The cleanup and abatement activities shall be supervised on the ground by the licensed or certified professional who prepared the repair and maintenance plan.
 - C. On or before February 15, 1998, submit a compliance report which clearly delineates measures taken to comply with paragraph B above.
8. In a letter dated January 8, 1998, the Corps requested the Regional Water Board to hold in abeyance any finding of noncompliance of the Time Schedule Order by the Corps until 120 days from the date of the letter. On January 22, 1998, the Regional Water Board agreed to hold in abeyance a finding of noncompliance until May 8, 1998, but indicated that failure by the Corps to make a good faith effort to comply with Order No. 97-130 by May 8, 1998 would result in potential administrative civil liability based on the deadlines contained in Order No. 97-130.
9. At a meeting with Corps and Regional Water Board staff on February 10, 1998, Board staff agreed that the condition of Kelly Road in the Russian River watershed was such that it could be excluded from the cleanup and abatement activities.
10. On May 8, 1998, the Corps met with Regional Water Board staff and presented the Kelly Road sediment source inventory and repair and maintenance plan. However, as of this date, the Corps has failed to complete the cleanup and abatement activities, and to submit a compliance report.

11. The Corps has jurisdiction over Kelly Road and, by virtue of its ownership, is engaged in an activity that is resulting, or may result, in the discharge or runoff of pollutants. Congress has therefore waived the Corps' sovereign immunity from compliance with Cleanup and Abatement Order No. 97-51 and Time Schedule Order No. 97-130, pursuant to Clean Water Act section 313(a), 33 U.S.C. section 1323(a).
12. Under Section 13308(b) of the California Water Code, the Regional Water Board may impose civil penalty for violations of the time schedule based upon the amount reasonably necessary to achieve compliance, not to include any amount intended to punish or redress previous violations and not to exceed ten thousand dollars (\$10,000) for each day in which the violation occurs. The civil penalties prescribed by Order No. 97-130 were reasonably necessary to achieve compliance with that Order.
13. An evidentiary hearing to consider the issuance of a complaint for administrative civil liability was held by the Regional Water Board on May 27, 1998 in Santa Rosa, California. At the conclusion of the hearing, the Regional Water Board directed the Executive Officer to issue a Complaint for Administrative Civil Liability in the amount of \$100,000 to the Corps, with a suspended payment if the Corps meets specified conditions.
14. The maximum penalty due pursuant to Time Schedule Order No. 97-130 was \$370,000, based on \$10,000 for the first day of violation and \$1000 for each additional day, as shown below:

<u>Task</u>	<u>Due Date</u>	<u>Days Overdue</u>	<u>Calculation</u>	<u>Subtotal</u>
A	12/30/97	128	(1 x \$10,000) + (125 x \$1,000) =	\$135,000
B	1/30/98	117	(1 x \$10,000) + (115 x \$1,000) =	\$125,000
C	2/15/98	101	(1 x \$10,000) + (100 x \$1,000) =	<u>\$110,000</u>
TOTAL=				\$370,000

15. As of the May 27, 1998 hearing, the Corps had failed to comply with Tasks B and C of Order 97-130. The amount of \$100,000 proposed in this complaint is less than the amount due pursuant to Order No. 97-130 because the Corps completed Task A on May 8, 1998, and has made some progress toward compliance with the rest of the Order. This amount is also consistent with a review of the following factors:

1. The nature, circumstance, extent, and gravity of the violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on ability to continue in business, any prior history of violations, the degree of culpability, economic savings, if any, resulting from the violation, and such matters as justice may require (California Water Code, Section 13327).
16. At the May 27, 1998 hearing, the Corps agreed to submit to the Board monthly status reports on the progress of the project by the fifteenth of each month.
17. The issuance of a Complaint for Administrative Civil Liability is an enforcement action by a regulatory agency, and is therefore exempt from the provisions of the California Environmental Quality Act (CEQA, Public Resources Code section 21000 et seq.) in accordance with Title 14, California Code of Regulations, section 15321(a)(2).

THE CORPS IS HEREBY GIVEN NOTICE THAT:

1. I am proposing that the U.S. Army Corps of Engineers pay an Administrative Civil Liability in the amount of \$100,000. Payment of fifty thousand dollars (\$50,000) of this amount is suspended, conditioned upon submission of plans and specifications for the Priority One sites to the satisfaction of the Executive Officer by August 1, 1998. Payment of the remaining fifty thousand dollars (\$50,000) is suspended, conditioned upon completion of construction at all Priority One sites to the satisfaction of the Executive Officer by December 1, 1998. The Priority One sites are those identified by the Corps in the Kelly Road Sediment Source Inventory And Repair Maintenance Plan.
2. An additional hearing to affirm, reject, or modify this Complaint may be held on August 27, 1998, regarding this matter unless the Corps waives its right to an additional hearing. If the Corps waives its right to an additional hearing, this Complaint becomes a final order of the Regional Water Board not subject to further review.
3. If an additional hearing is held, the Board will consider whether to affirm, reject, or modify the amount of proposed Administrative Civil Liability, or whether to refer the matter to the Attorney General for recovery of judicial liability.
4. If the Corps wishes to waive the hearing, the Corps must sign the waiver and return it to the Regional Water Board's office by 4:30 p.m., July 31, 1998.
5. Payment of the Civil Liability or compliance with the conditions for suspension of payment does not satisfy the Corps obligation to comply with the remainder of the tasks required by Time Schedule Order No. 97-130.

Lee A. Michlin
Executive Officer

July 2, 1998

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